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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Closed Captioning and Video Description)
of Video Programming)

MM Docket No. 95-176)

TO: The Commission

**Opposition of the
National Association of Broadcasters to
Petitions for Reconsideration**

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Henry L. Baumann
Jack N. Goodman

November 26, 1997

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Summary

NAB opposes the requests of Self Help for Hard of Hearing People and the National Association of the Deaf for reconsideration. In the *Report and Order* adopting captioning rules, the Commission struck a careful balance between Congress' desire for more captioned programming and its concomitant goal that the addition of captioning requirements not result in a loss of programming choices to viewers generally. The Commission took an appropriately cautious approach in developing its first captioning rules, and it should hesitate before changing those rules.

It is certainly unnecessary for the Commission to adopt the quarter-by-quarter captioning minimums suggested by Self Help for Hard of Hearing People. Broadcasters' acquisition of captioned programming and their hiring of new captioning personnel should not be forced into a rigid timetable. It is more appropriate that the Commission establish a goal and allow programmers to decide how best to achieve it.

Contrary to NAD, Congress did not limit the FCC's discretion to adopt reasonable exemptions in its captioning rules. The Commission's adoption of a *de minimis* exemption allows programmers some measure of flexibility without requiring repeated and burdensome requests for waivers to the Commission.

The Commission was correct in providing an exemption for most advertising. Neither the text nor the legislative history of the Telecommunications Act suggests that Congress intended to extend captioning requirements to advertising. Language in other recent communications statutes shows that Congress understands the distinction between programming and

advertising. Extending captioning requirements to political advertising would conflict with other provisions of the Communications Act dealing specifically with candidate uses of broadcast stations.

The Commission properly chose to allow stations to use different captioning technologies, and it should not change that decision to require live captioning of local news programs. Such a rule would increase stations' captioning costs and result in additional waiver requests. Further, it would freeze technology and not give stations the opportunity to use new captioning techniques as they become available.

Finally, the Commission should not alter the procedures it adopted for programmers to seek exemptions based on the undue burden captioning costs would create for particular programs.

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TO: The Commission

**Opposition of the
National Association of Broadcasters to
Petitions for Reconsideration**

The National Association of Broadcasters ("NAB")¹ submits this opposition to the petitions for reconsideration filed by Self Help for Hard of Hearing People, Inc. and the National Association of the Deaf and the Consumer Action Network. In the *Report and Order* in this proceeding,² the Commission sought to strike a careful balance between the goal Congress established of increasing the amount of captioned programming on television, and Congress' equal determination that captioning obligations not result in a diminution of the amount and variety of programming available to the general public. The petitions for reconsideration ask the

¹ NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

² *Closed Captioning and Video Description of Video Programming*, FCC 97-279 (released Aug. 22, 1997).

Commission to change that balance and to impose broad captioning requirements with little, if any, concern for the impact of such rules. The Commission should deny the petitions.

In the *Report and Order*, the Commission adopted a schedule for implementing captioning requirements that would permit broadcasters and other suppliers of television programming time to develop new captioning resources to meet the increased demand universal captioning requirements will engender. The Commission also allowed program suppliers time to provide captions for existing programming so as to avoid forcing programs off of the air because captions could not be timely or economically added to them. The Commission ensured that existing levels of captioning will not be diminished during the transition period, and it committed itself — where appropriate — to revisit its rules as technological and marketplace developments warrant to determine whether additional captioning requirements should be imposed.

This cautious approach correctly took account of the very large amount of captioned programming that broadcasters and other program suppliers have created voluntarily. The Commission was well within the discretion Congress afforded it when it determined that its initial foray into mandatory captioning rules should allow the affected industries flexibility in expanding the range and number of programs that are captioned. The Commission should hesitate before accepting the calls in the petitions for reconsideration that it abandon that approach based on unwarranted fears that broadcasters and others will not in fact heed Congress' directive and work to increase the amount of captioned programming.

The Commission Should Reject Efforts to Micro-Manage the Transition Process

The Commission understood that an adequate pool of captioning resources does not now exist that would permit the immediate imposition of substantial new captioning requirements. It therefore provided that specific new captioning requirements would not take effect for two years after the captioning rules' effective date, reasoning that broadcasters and other video programmers could use those two years to develop new captioning capabilities. Self Help for Hard of Hearing People (SHHH) asks the Commission to modify the rules to impose specific and growing captioning requirements during each quarter of 1999. Were the Commission to accept SHHH's proposal, it would largely destroy the benefits of the flexibility it afforded video programmers in the *Report and Order*.

SHHH argues that detailed interim transition requirements are needed to ensure a steady growth in demand for captioners. Petition at 3-4. SHHH apparently believes that broadcasters and other video programmers will wait until the last minute before the captioning requirements go into effect before taking steps to add to their captioning capabilities. There is no reason for the Commission to accept SHHH's hypothesis that broadcasters will act in such an irresponsible manner. The steadily growing level of captioning undertaken voluntarily by broadcasters instead demonstrates that there is no need for the Commission to dictate quarter-by-quarter captioning minimums as the industry moves into the transition period.

Indeed, adoption of SHHH's proposal would seriously impede the smooth transition the Commission seeks. SHHH apparently assumes that each of its proposed quarterly captioning levels would require additional captioners, and that those personnel would be equally available to

stations across the country. Neither assumption is justified. Once a station hires additional captioners or otherwise invests in captioned programming or captioning technology, it will fully use those resources. Thus, some stations may obtain additional captioning resources early in the transition period and provide higher levels of captioned programming than SHHH envisions while the availability of captioning resources spreads to other stations. SHHH would instead put a straight jacket on the captioning process, which is likely to lead to more stations seeking waivers if captioners do not become available on the precise schedule SHHH envisions.

The Commission should allow broadcasters and video programmers to “ramp up” their captioning capabilities as best fits their own situation, and should not seek to manage every step of the process. SHHH’s request for reconsideration should be denied.

The Commission Has Ample Authority to Adopt a *De Minimis* Captioning Exemption

The National Association of the Deaf and Consumer Action Network (NAD) argue that the Commission lacks the authority to allow programmers the five percent *de minimis* exemption it adopted in the *Report and Order*. Although NAD recognizes that Congress did not anticipate that every program would be captioned, it argues that the Congress did not intend to permit blanket exemptions. Instead, NAD argues that the Commission can only allow programmers the specific exemptions mentioned in the statute. NAD Petition at 3-4.

Had Congress envisioned that the Commission would not have discretion to implement captioning rules, it could have simply directed the agency to add specific new provisions to its rules as it did when it required the Commission to adopt particular radio ownership rules. Instead, Congress required the FCC to conduct a rulemaking proceeding, clearly anticipating that

the Commission would seek comments from interested persons and would adopt captioning rules based on those comments. By vesting discretion in the Commission, Congress anticipated that the Commission would adopt rules that would achieve Congress' objective of increasing the amount of captioned programming, without unduly burdening programmers or the Commission. NAD cites to nothing in the statute or its legislative history that purports to deny the Commission the discretion to adopt particular captioning rules.

NAD would prefer that the Commission afford broadcasters only limited and specific exemptions for particular programs. That approach would place heavy burdens on both broadcasters and the Commission. Rather than having to demonstrate that captioning would create an undue burden for particular programs, such as one-time local events, broadcasters can simply use their *de minimis* exemption. This reduces their compliance burden and also permits the Commission to avoid having to address numerous limited exemption requests.

NAD asks the Commission to impose a burdensome and complex waiver process that would require programmers to report every time a program is aired without captions. The only apparent justification for such a rule would be a belief that broadcasters will ignore Congress' and the Commission's demands that more programs be captioned. However, the tremendous voluntary growth of captioning indicates that the Commission can achieve Congress' goal while allowing broadcasters substantial flexibility as the rules are implemented. Such flexibility is certainly appropriate as the Commission adopts captioning rules for the first time. If experience shows that the rules are not working as the Commission expects, there will be ample time to adjust them to deal with particular problems as they arise.

The Commission Correctly Exempted Short Advertisements from Captioning Requirements

NAD (Petition at 7-10) seeks reconsideration of the Commission's determination that short-form advertising need not be captioned. NAD's reasoning is incorrect. First, NAD argues that the Commission can only exempt programs based on specific economic burdens. As we demonstrate above, Congress did not so cabin the Commission's rulemaking authority.

Second, NAD seeks to argue the importance of advertising as part of television programming. The sources it cites, however, are wholly inapposite. NAD claims that the provisions of the must carry statute requiring cable operators to carry the entirety of a television station's program schedule show Congressional recognition of the importance of advertising. That provision did not reflect any particular importance that Congress placed on advertising *per se*, but instead a measure to prevent cable operators from stripping advertising from broadcast signals for anticompetitive reasons. Similarly, NAD's citations to *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), and other commercial speech cases are unavailing. Those cases all deal with efforts by the government to prevent consumers from gaining access to information about commercial transactions, and cannot be read to require a government mandate that advertising be made more broadly available.

Instead, it is far from clear that Congress had any intent to require captioning of advertising. The text of the captioning provision of the Telecommunications Act does not define the term "video programming," and does not include any specific reference to advertising. The Act's legislative history similarly does not include any reference to advertising as part of the problem Congress intended the FCC to address. Had Congress placed the importance on

captioning advertising that NAD suggests, it is logical to expect that Congress would have at least mentioned the subject.

In other contexts, Congress has used the term “programming” in ways that clearly have distinguished program material from advertising. In the Cable Act of 1992, Congress found that “[b]roadcast television *programming* is supported by revenues generated from *advertising*.” Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(12)(emphasis added). Congress made the same distinction in the Children’s Television Act, when it concluded that “licensees should follow practices in connection with children’s television *programming* and *advertising* that take into consideration the characteristics of this child audience.” Pub. L. No. 101-437, § 101 (emphasis added).

In other recent communications legislation, therefore, when Congress used the word “programming,” it did not include television advertising within that term. In the absence of contrary legislative history, this strongly suggests that Congress’ use of the same term in the captioning provisions of the Telecommunications Act reflects the same distinction, and that captioning requirements were not intended to apply to commercial matter.

In implementing the Children’s Television Act, the Commission shared the same understanding of the difference between advertising and programming. It adopted a rule which limits the amount of “commercial matter” that can be aired during “children’s programming.” 47 U.S.C. § 73.670. Thus, like Congress, the Commission has understood that the use of the term “programming” in common parlance refers to news, sports, or entertainment program material, but not advertising messages.

Further, as the House Commerce Committee made clear, it was Congress' expectation that new program material would be captioned by producers since it would be inefficient to have each station or other video distributor add captions to programs. H.R. REP. NO. 204, 104th Cong., 1st Sess. 114 (1995). Had Congress expected that the thousands of producers of individual advertisements that appear on television stations would be obliged to comply with captioning regulations, it is reasonable to expect that Congress would at least have made reference to such a drastic expansion of the Commission's regulatory purview. The absence of any such discussion confirms that Congress did not intend to include advertising within the definition of "video programming" it expected to be captioned.

NAD argues (Petition at 9-10) in particular for a requirement that political advertising be captioned. It does not discuss how such a requirement could work in practice. Even more than regular commercial advertising, political advertisements are frequently prepared or modified at the last minute before airing. A requirement that stations refuse to air political messages that are not captioned would be inconsistent with the Communications Act's prohibition on censorship of station uses by candidates. 47 U.S.C. § 315(a). For candidates for federal office, rejecting advertisements because they are not captioned may run afoul of stations' reasonable access obligations. 47 U.S.C. § 312(a)(7). *See Becker v. FCC*, 95 F.3d 75 (1996). As a practical matter, captions added to political advertisements at the last minute also may block viewing of the visual sponsorship identification information that the Commission's rules require. 47 C.F.R. § 73.1212(a)(2)(ii).

The NAD Petition thus provides no basis for the Commission to change its conclusion with respect to the inclusion of advertising messages within captioning requirements.

The Commission Should Not Mandate Live Captioning

NAD (Petition at 14-17) requests the Commission to reconsider its decision not to impose requirements to use specific captioning technologies. NAD instead wishes the Commission to require stations to use live captioning for newscasts. Many stations now use electronic newsroom captioning (ENR) to provide captions for local programs. This technology permits them to feed TelePrompter or other scripted material into the captioning encoder, substantially reducing the cost of captioning. While it recognized that stations using ENR may have some unscripted portions of newscasts uncaptioned, the Commission balanced this against the high cost of live captioning and the absence of a large pool of trained captioners. It chose to urge stations to script (and therefore caption) additional portions of their news programs, and it committed itself to reexamining this issue in light of station experience and the availability of live captioning services or other new captioning technologies.

Given the fact that these are the Commission's first captioning rules, it was entirely appropriate for the Commission to allow stations great flexibility in the ways in which they add captions to local programs. If the Commission requires stations to use the most expensive captioning methodology for their local programs, far more stations — particularly in smaller markets — will find that the costs of captioning are overly burdensome and will either seek waivers or reduce the amount of local news programs. Neither result would serve the public interest.

If stations are forced to seek waivers, then their news programs will not be captioned at all. Captioning substantial portions of local newscasts using ENR, even if some segments are not

captioned, would provide far greater benefits than a waived requirement that all of the program be captioned. If stations take the alternative of reducing the amount of local news programs because of the cost of live captioning, that would result in a diminution of valuable programming for deaf and hearing people alike. That would run counter to Congress' direction that the Commission's captioning rules not result in the loss of programming choices.³

The Commission should also deny NAD's Petition because it would deny stations the ability to experiment with new captioning technologies. Voice recognition technology is steadily improving and may become a viable option for captioning live television programs. The Commission should not mandate the use of live captioning when other, more efficient, technologies may be developed. The *Report and Order* properly rejected requests that the rules mandate the use of live captioning, and the Commission should deny NAD's request to modify that decision.

The Undue Burden Exemption Procedures Should Not Be Modified

Finally, the Commission should deny NAD's request (Petition at 17-18) to amend the procedures it adopted for video programmers to seek exemptions from captioning requirements based on undue burden. NAD first asks that the Commission require stations to caption programs while their exemption request is under consideration. If the captioning of a particular program would create an undue burden, it would be unfair to require stations to undertake that burden while seeking relief from the Commission. If a programmer is correct that captioning

³ See H.R. REP. NO. 458, 104th Cong., 2d Sess. 183 (1996)(House Report provided that "the Commission shall balance the need for closed captioned programming against the potential for hindering the development and distribution of programming.").

would be an undue burden, acceptance of NAD's position would force programmers to drop programs for which captions could not be economically added. Absent some evidence that the waiver process has been abused, the Commission should not force stations to undertake extraordinary burdens in order to seek relief from captioning requirements.

The Commission should also deny NAD's request that undue burden exemptions be limited in time. Doing so would only result in greater burdens on both programmers and the Commission. If captioning a particular local program or coverage of a local event — such as a high school football game — would be unduly burdensome, the same factors that lead to that conclusion are almost certain to be present in subsequent years. Requiring programmers to repeat the same exemption request would only increase their cost of compliance with the captioning rules and force the Commission to devote scarce resources to handling repetitious requests for waivers. NAD can point to no benefit that would accrue to deaf people from changing the Commission's rules to increase the costs of compliance.

Conclusion

Although broadcasters may not agree with many of the conclusions the Commission reached in adopting captioning rules, we recognize that the Commission was faced with a difficult task of balancing competing interests. Overall, the choices the Commission made were well within its discretion. It should deny requests to restrike that balance and to impose more stringent captioning rules, particularly in the absence of any experience with the rules it adopted.

If the amount of captioned programming fails to increase as Congress and the Commission expect, there will be ample time to address such problems as they arise.

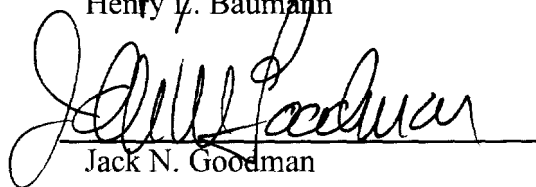
Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS

1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430



Henry L. Baumann



Jack N. Goodman

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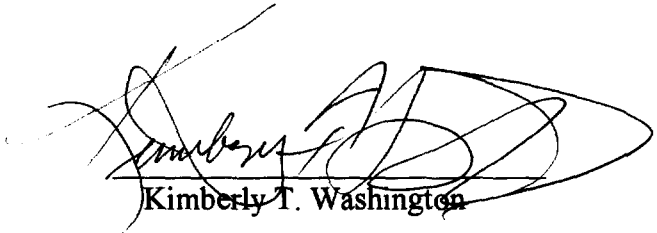
CERTIFICATE OF SERVICE

I, Kimberly T. Washington, hereby certify that a copy of the Opposition of the National Association of Broadcasters to Petitions for Reconsideration was, this 26th of November, 1997, mailed via First Class Mail, to the following:

Karen Peltz Strauss, Esquire
Legal Counsel for Telecommunications Policy
National Association of the Deaf
814 Thayer Avenue
Silver Spring, MD 20910-4500

Lori Dolqueist, Esquire
Angela Campbell, Esquire
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Suite 312
Washington, D.C. 20001-2022

Donna Sorkin
Executive Director
Self Help for Hard of Hearing People, Inc.
7910 Woodmont Avenue
Suite 1200
Bethesda, MD 20814


Kimberly T. Washington